IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri

JURISDICTIONAL STATEMENT

LONDON & GREENBERG
NORMAN S. LONDON
LAWRENCE J. FLEMING
418 Olive—Suite 404
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Appellants

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Cases Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

WILLIAM J. VORBECK, et al.,[1]
Appellants,

vs.

THEODORE D. McNEAL, et al.,[2]
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

This is an appeal from the judgment by a three-judge panel of the United States District Court for the Eastern District of

[1] William J. Vorbeck, Gerald Hanley, Roy Perkins, Donald Strate, James Eichelberger and the St. Louis Police Officers' Association, a not for profit corporation, Appellants.

[2] Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon, John H. Poelker, as the Board of Police Commissioners of the City of St. Louis, Appellees.

Missouri, entered on February 19, 1976, denying injunctive relief and holding that Section 105.510, Revised Statutes of Missouri, which excludes police officers from the bargaining procedures granted to other public employees, has a rational relation to a legitimate objective of the State and does not abridge any constitutional rights of such police officers.

Although the Court declared the Missouri statute unconstitutional insofar as it prohibits police officers from forming and joining labor organizations the Court held that it was not a denial of equal protection to exclude police officers from the limited bargaining procedures provided for other public employees under Section 105.520, R.S.Mo. The Judgment, Memorandum and Opinion of the Three Judge District Court is included herein as Appendix A.[3] This opinion has not yet been officially reported, but has been extensively commented upon in BNA's Government Employee Relations Report, No. 651 p. B-4 (April 5, 1976).

JURISDICTION

This suit was brought under Title 42, U.S.C., Section 1983, and Title 28, U.S.C., Sections 2201 and 2202 seeking to enjoin the enforcement of Sections 105.510 and 105.520, Missouri Revised Statutes, 1969, as being unconstitutional. A Three Judge District Court was convened pursuant to Title 28, U.S.C., Section 2281. The judgment of the Three Judge District Court was entered on February 19, 1976 and Notice of Appeal was filed in that Court on March 16, 1976.

The jurisdiction of the Supreme Court to review this judgment on direct appeal is conferred by Title 28, U.S.C., Section 1253.

---

[3] Although this case was heard and submitted simultaneously with a similar suit brought by St. Louis County Police Officers (*Sahm et al. v. Nations et al.*, Cause No. 75-78C(3)) this appeal is taken only by the Appellants named herein in Cause No. 75-77C(3).

The following decisions sustain the jurisdiction of the Supreme Court to review this judgment on direct appeal. *MTM, Inc. v. Baxley*, 720 U.S. 799 (1975); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *Radio Corporation of America v. United States*, 341 U.S. 412 (1950), affirming 95 F. Supp. 660 (N.D. Ill. 1950).

STATUTES INVOLVED

Sections 105.500-105.530, Missouri Revised Statutes, 1969, as well as Article I, Section 29 of the Missouri Constitution, as amended, are set forth in Appendix B hereto. Briefly summarized, Sections 105.510 and 105.520 grant to public employees generally (but not police officers and teachers) the right to form and join labor organizations and to compel meetings and conferences between their exclusive bargaining representatives and their administrative bodies. Section 105.530, however, withholds the right to strike from all public employees, and the right to strike is not in issue in this case.

QUESTIONS PRESENTED

I. Did the Three Judge District Court err in determining that a Missouri Statute, withholding from police officers, the right granted to other public employees to engage in limited bargaining activities, did not deny the right to equal protection of the law to police officers, and in denying the request of appellants to enjoin appellees from utilizing such statute?

II. Did the Three Judge District Court err in determining that the right of police officers to meet, confer and discuss with their public employer, through their designated representative, proposals relative to salaries and other conditions of em-

ployment, or otherwise collectively negotiate with such public employer, was not of such a fundamental constitutionally protected dimension so as to require a showing of compelling state interest to support the arbitrary classification between police officer and other public employees made by the Missouri Statute?

STATEMENT

The individual plaintiffs who are St. Louis Police Officers employed in and by the City of St. Louis, Missouri, and the St. Louis Police Officers' Association, a not for profit corporation organized and existing under the laws of the State of Missouri, of which the officers are members, brought this action for declaratory and injunctive relief under Title 42, U.S.C. Section 1983 and Title 28, U.S.C. Sections 2201 and 2202. The suit names as defendants the individual members of the Board of Police Commissioners; City of St. Louis. The suit challenged the constitutionality of Sections 105.510 and 105.520, Missouri Revised Statutes, 1969 and certain Personnel Regulations of the Police Department which prohibited officers from joining employee organizations not approved by the Board. The following grounds were asserted:

1. The statute and the Regulations violate the First and Fourteenth Amendments in that they deny to police officers the right to freedom of speech, and assembly and to petition for the redress of grievances and the right to association.

2. The statutory exclusion of police officers violates the Fourteenth Amendment of the United States Constitution in that it creates an unreasonable and arbitrary classification of police officers since other public employees in Missouri have an absolute and statutorily recognized right, (1) to form and join labor organizations, (2) to present proposals to their public

bodies relative to salaries and other conditions of employment through representatives of their own choosing and (3) to compel public bodies to meet, confer and discuss such proposals and to reduce the results of said meetings to writing.[4]

3. The statutory exclusion of police officers violates the Fourteenth Amendment to the United States Constitution in light of Article I Section 29 of the Missouri Constitution which guarantees to all employees of Missouri the right to organize and bargain collectively through representatives of their own choosing in that said statute creates an arbitrary and unreasonable exception to the aforesaid constitutional provision, and constitutes special legislation denying to police officers rights granted to other employees.

As the District Court properly noted there were no material questions of fact and the case was decided on the basis of a stipulation and cross motions for summary judgment.

The appellant police officers and the St. Louis Police Officers Association (hereinafter the Association) wish to designate the Association as a labor organization which would be recognized by the Board of Police Commissioners (hereinafter the Board) as the representative of its police officer members for the purposes of presenting proposals to the Board relative to salary and other conditions of employment. The appellants also wish to meet, confer and discuss these matters with the Board and to reduce the results to writing as provided for in Sections 105.510 and 105.520, Missouri Revised Statutes 1969. Despite a written request indicating that the Association had received authorization cards from over 60% of the department's commissioned employees. The Board adamantly refused to recognize or meet with the designated representatives. Instead the Board issued a bulletin directing the employees' attention to

---

[4] As previously noted no public employees in Missouri have the right to strike and the right to strike is not in issue in this case.

department Rule 8.621 which prohibited membership in any organization which was not approved by the Board. The Board warned that any organization which was so approved would remain so, only as long as it did not attempt to function as a labor organization. If it did so it would be removed from the approved list and as an unapproved association, members who were police officers would be subject to suspension, dismissal or other disciplinary action by the Board.

Upon this state of facts, the Court held that Rule 8.621 was an unconstitutional abridgment of freedom of association guaranteed by the First and Fourteenth Amendments to the United States as there was no showing that labor organizations are detrimental to the "sui generis, para-military" nature of police departments. The court further held that since Section 105.510 had been used as in enabling measure for the promulgation of an invalid Rule restricting constitutionally protected rights it was unconstitutional insofar as it prohibited police officers from forming or joining labor organizations.

However, the Court held that the exclusion of police officers from the **mandatory** bargaining procedures created for other public employees by Section 105.520 has a rational relation to a legitimate objective of the state and does not abridge any of appellants' constitutional rights. In addition, the court refused to grant an injunction restraining appellees from enforcing or utilizing Sections 105.510 as a means of excluding appellants from the benefits of Section 105.520.

THE QUESTIONS ARE SUBSTANTIAL

The right of police officers to form and join labor unions and bargain collectively (subject, of course to a limitation on their right to strike) has been a question of mounting national interest. See *Police Officers Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971). The Court below recognized that appellants have a constitutional right to organize or join labor organizations under the associational protections of the First and Fourteenth Amendments to the United States Constitution, but at the same time, held that the exclusion of the appellant police officers by Section 105.510 from the bargaining rights provided to other public employees in Section 105.520 did not violate appellants' constitutional right to equal protection of the law. The Court reasoned that the right to collective bargaining is not a "fundamental constitutional right" and that the exclusion has a rational relation to a legitimate state interest. Assuming, without conceding, that the Court below chose the right test in deciding appellants' Equal Protection claim it is submitted that the Court erred in finding such a rational relation.

It is clear that, in analyzing an Equal Protection claim, courts consider three main elements: the character of the classification in question; the individual interests affected by the classification and the governmental interests asserted in support of the classification *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the case at bar these three elements may be stated as follows: The character of the classification is policemen viz a viz other public employees in Missouri. The benefit withheld by the classification or the "interest affected" is the right to "present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing," (Section 105.510) and the right

to "meet, confer and discuss such proposals" with the public body for the purpose of reducing them to writing to present to an appropriate body for adoption, rejection or modification (Section 105.520). The asserted state interest involved is to maintain a disciplined, unbiased police force for the safety and welfare of the populace.

It is a basic Constitutional rule that for a classification, such as the one created by Section 105.510, to withstand an attack on Equal Protection grounds, it must be clear that there is a rational relation between the withholding of rights granted to others and the asserted state interest involved. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

Appellants contend that under the decision of the District Court in the present case, their position has become somewhat irrational. As one veteran officer phrased it "they let us in the restaurant but they won't let us eat." The court recognized the officer's right to join labor organizations thus giving them equality with all other public employees, then refused to grant them the rights for which the statutory scheme exists. Thus the fundamental right to organize collectively for the purpose of improving their economic situation guaranteed by the First and Fourteenth Amendments to the United States Constitution granted to these appellants by the Court below has been rendered nugatory. This has occurred because of the arbitrary, capricious and irrational classification between police officers and all other public employees in relation to the bargaining provisions of Sections 105.510 and 105.520 which the Court allowed to stand.[5]

---

[5] Subsequent to the District Court's decision in the instant case, the Missouri Court of Appeals rendered a decision invalidating an agreement between a Teachers' Association and the Board of Education noting that teachers, (as are police officers) are prohibited from engaging in the bargaining procedures provided in Section 105.520, the Missouri Court of Appeals recognized the District Court's decision and stated:

> [T]he agreement is an attempt to require the submission of individual grievances on matters of compensation and working conditions to mandatory negotiation procedures. To enforce this agreement would allow excluded groups to engage in the modified bargaining procedure allowed other public employees under § 105.510 contrary to the legislative intent. **St. Louis Teachers Association v. Board of Education,** No. 36938 (Mo. App., Mar. 16, 1976) — SW2d —.

Appellees contend there is a legitimate state interest in denying to police officers the rights granted to all other public employees based on *King v. Priest*, 206 S.W.2d 547 (Mo. en banc 1947). *King* recognized that there is a necessity for order, discipline and authority in a police force and held that police are therefore "*sui generis.*" See also *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969) where the Missouri Supreme Court specifically rejected the contention that the exclusion of police from the benefits of the act created an unconstitutional classification. Appellants recognize that police officers perform functions in furtherance of important public interest, but deny that there is any rational relation between the withholding of the rights here involved and the asserted state interest in maintaining a disciplined police force. There has been no showing or suggestion of how the grant of the rights in question which are enjoyed by all other public employees in Missouri would impair the asserted state interest. To the contrary, it is submitted that the court having recognized the rights of police officers to form and join labor organizations, it is imperative that an orderly process of resolving disputes through conference rather than confrontation be implemented.

How the employee input provided by Sections 105.510 and 105.520 would disrupt the discipline of the Police Department is too vague to have even found expression by the Court below. It seems obvious that the grant of the rights in question would

not hinder but would rather improve morale and discipline within the department. As the situation stands now, the Board refuses, and may indeed be forbidden,[6] to entertain any dialogue with the Association to which a majority of its police officers belong, about anything whatsoever. It is contended that because of the denial of rights involved the asserted state interest is disserved rather than fostered. Discontent without an avenue of communication is indeed a dangerous situation where public safety is concerned. It is difficult to perceive how the denial of the most basic economic rights of police officer employees can be said to insure a disciplined police force.

In a recent case, *University of New Hampshire Chapter of the American Association of University Professors v. Haselton*, 397 F. Supp. 107 (D.N.H. 1975), a Three Judge District Court faced a similar situation regarding the right of university professors to bargain collectively with their State employer. The right was withheld from them by a statute which granted such rights to all other public employees. The Court did not find an equal protection violation in the classification, but based it findings of a rational relation between the classification and the right withheld on grounds which contrast so substantially with those found by the Court below in the case at bar as to be worthy of note. The court in *Haselton* made clear that the general nature of university governance was of such an internal, democratic nature that external collective bargaining might disrupt this democratic balance. In addition, the Court noted that great differences might exist in ability of those involved—university professors—and that collective bargaining might tarnish their professional status and have an adverse effect on those with special ability. 397 F. Supp. *supra* at 110 and 111 and N. 13. Even if it is assumed although it is not conceded that the *Haselton* case correctly rejected the equal protection argument, the differences between *Haselton* and the case at bar are clear, and

[6] See Footnote 5, *supra*.

serve to illustrate what bases are necessary for the finding of a rational relation between a suspect classification and the state interest asserted in support of that classification.

It may well be that appellee's primary concern is the unarticulated fear of a police strike (see Tr. P. 51). Appellants do not in any way assert that they have a right to strike. It must be again noted, however, that the Missouri legislature has specifically withheld the right to strike from the other public employees who are granted bargaining rights under Sections 105.510 and 105.520. Thus all public employees are denied the right to strike in Missouri and could be disciplined if they chose to strike illegally. Consequently, granting to police officers the bargaining rights enjoyed by other public employees, will not increase the possibility of a police strike but may, in fact, provide a viable alternative to that course. The plain fact is that police in Missouri could choose to strike illegally, as could any other public employee, with or without the right to the bargaining procedures provided for by Sections 105.510 and 105.520. However, with such bargaining procedure avenues of communication would at least be opened and resort to an illegal strike could be averted. It is noteworthy in this connection that appellants have not engaged in any type of strike or withholding of services and have chosen to pursue their legal remedies through this action.

For the reasons stated, it is urged by appellants that the District Court erred in finding a rational relation between the arbitrary exclusion of police officers from the operation of the bargaining provisions of Chapter 105 and that appellants were deprived of the equal protection of the law guaranteed to them by the Fourteenth Amendment to the United States Constitution.

Appellants further contend that the Court below erred in determining that the bargaining rights granted to all other public employees by Sections 105.510 and 105.520 Missouri Re-

vised Statutes were not of such a fundamental constitutionally protected nature so as to require the showing of a compelling state need to support such an arbitrary classification as created by Section 105.510.

It is contended by appellants that the right of an employee to compel his employer to listen to him regarding salary and other conditions of employment is constitutionally fundamental. Any other view is a throwback to the laissez-faire capitalism of the 19th century. This right has been recognized for private employees by the enactment of the National Labor Relations Act, Title 29 U.S.C. Sections 151 et seq. See *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 33 (1937).

That these rights are of such fundamental character is supported by the decision in *Police Officers Guild v. Washington*, 369 F. Supp. 543 (D.D.C. 1973) wherein the court reasoned:

"The theory that public employment may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. *Keyistian v. Board of Regents, supra*, 385 U.S. at 605-06; *Illinois State Employees Union v. Lewis*, 473 F. 2d 561, 568 (7th Cir. 1972); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Muller v. Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970); *Bruns v. Ponerlean*, 319 F. Supp. 58, 63-64 (D. Md. 1970); *Brukiewa v. Police Comm's*, 257 Md. 36, 263 A. 2d 210 (1970). Police, 'like teachers and lawyers, are not relegated to a watered-down version of constitutional rights. There are rights of a constitutional stature whose exercise a state may not condition by the exertion of a price . . .' *Garrity v. New Jersey*, supra, 385 U.S. at 500 (1967). Among the rights so protected are the right of individuals to associate to further their personal beliefs and, more specifically with respect to the rights asserted by the complaints in this action, the right of public employees to organize collectively and to select

representatives for the purposes of engaging in collective bargaining. *United Federation of Postal Employers v. Blount*, 325 F. Supp. 879, 833 (D.D.C. 1971); *Thomas v. Collins*, 323 U.S. 516, 532-34 (1945); *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 33 (1937); *see Hague v. CIO*, 307 U.S. 496 (1939)."

It is conceded that there are several District Court opinions which reach opposite conclusions on the question of public employee collective bargaining rights: *Newport News F.F.A. Local 794 v. City of Newport News*, 339 F. Supp. 1316 (E.D.Va. 1972); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D.Ga. 1971); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N. Car. 1969). These cases hold that there is a constitutionally protected right to join a labor organization, but no right to enjoy the natural fruits of joining such an organization, namely the right to bargain collectively.

However, as noted by the three judge panel in *Washington, supra*, other cases seem to imply that among the fundamental rights safeguarded by the First Amendment is "the right to organize collectively and to select representatives for the purpose of engaging in collective bargaining" *United Federation of Postal Clerks v. Blount*, 325 F.Supp. 879, 883 (D.C.D.C. 1971); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Thomas v. Collins*, 323 U.S 516 (1945). It is urged by appellants that this important question regarding the constitutional rights of public employees should be decided by the Supreme Court in order to obviate the confusion which presently exists.

Appellants believe that this problem is clearly present in the Case at Bar. Appellants have been granted a constitutionally protected right to join labor organizations but this right has been substantially "watered-down" *Garrity v. New Jersey*, 385 U.S. 493, by the simultaneous denial of the rights for which labor unions exist as provided all other public employees by Sections

105.510 and 105.520, to meet with and discuss salaries and other conditions of employment with the representatives of an appropriate public body. This case, therefore, presents an excellant opportunity for this Court to define and clarify the rights of police officers in the public employee labor field.

CONCLUSION

It is submitted, therefore, that the decision of the district court was erroneous in that it denies appellants the rights granted to other public employees of Missouri by Sections 105.510 and 105.520, that neither the "national relation" test nor the "compelling state interest" test permits such a classification and thus the district court's decision denies appellants the equal protection of the laws. Appellants submit that the questions presented are substantial and are of great national importance and that such issues require plenary consideration of the Supreme Court with briefs on the merits and oral arguments for their resolution.

Respectfully submitted,

LONDON & GREENBERG[†]

NORMAN S. LONDON

LAWRENCE J. FLEMING
418 Olive—Suite 404
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Appellants

[†] Counsel were assisted in the research and preparation of this jurisdictional statement by Thomas Flynn, law intern and senior law student at Washington University Law School, St. Louis, Mo., to whom appreciation is hereby expressed.

APPENDIX

APPENDIX A

In the United States District Court, Eastern District
of Missouri, Eastern Division

No. 75-77 C (3)

William J. Vorbeck, Gerald Haley, Roy Perkins, Donald Strate, James Eichelberger and The St. Louis Police Officers' Association, a Not-for-Profit Corporation,
Plaintiffs,

vs.

Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon, John H. Poelker, as the Board of Police Commissioners of the City of St. Louis,
Defendants.

No. 75-78 C (3)

Gustave W. (Pete) Sahm, President, Dan Hoag, Vice President, Larry Noel, Secretary, and John Easley, Treasurer, Individually and as Officers of the St. Louis County Police Officers Association, Local No. 844, AFL-CIO,
Plaintiffs,

vs.

Gus O. Nations, Chairman, Raymond F. McNally, Jr., Vice Chairman, Earl J. Gates, Secretary, D. Jeff Lance, Member, Individually and as Officers of the St. Louis County Board of Police Commissioners,
Defendants.

JUDGMENT

In accordance with the opinion of this court filed contemporaneously herewith, it is ordered, adjudged, and decreed as follows:

1. that Rule 8.621, as promulgated by the Board of Police Commissioners of the City of St. Louis, is declared unconstitutional on its face;

2. that RS Mo 1969 § 105.510 be and is declared unconstitutional insofar as it prohibits police officers from forming or joining labor organizations;

3. that plaintiffs' request for injunctive relief against the rule and statutes now adjudged to be unconstitutional is denied;

4. that all other declaratory and injunctive relief sought by plaintiffs in these consolidated actions is denied; and

5. that the costs shall be taxed equally between the parties plaintiffs and defendants in each case. No costs shall be taxed against intervenor State of Missouri.

Dated this 19th day of February, 1976.

M. C. MATTHES
Senior Circuit Judge

JAMES H. MEREDITH
Chief District Judge

H. KENNETH WANGELIN
District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

No. 75-77 C (3)

William J. Vorbeck, Gerald Haley, Roy Perkins, Donald Strate, James Eichelberger and The St. Louis Police Officers' Association, a Not-for-Profit Corporation,
Plaintiffs,

vs.

Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon, John H. Poelker, as the Board of Police Commissioners of the City of St. Louis,
Defendants.

No. 75-78 C (3)

Gustave W. (Pete) Sahm, President, Dan Hoag, Vice President, Larry Noel, Secretary, and John Easley, Treasurer, Individually and as Officers of the St. Louis County Police Officers Association, Local No. 844, AFL-CIO,
Plaintiffs,

vs.

Gus O. Nations, Chairman, Raymond F. McNally, Jr., Vice Chairman, Earl J. Gates, Secretary, D. Jeff Lance, Member, Individually and as Officers of the St. Louis County Board of Police Commissioners,
Defendants.

MEMORANDUM

Before Matthes, Senior Circuit Judge, Meredith, Chief District Judge, and Wangelin, District Judge.

Per Curiam

These two consolidated lawsuits once again raise the constitutionality of the Missouri Public Sector Labor Law, Sections 105.510 through 105.530, R.S. Mo., 1969. The plaintiffs, commissioned police officers of the City of St. Louis, Missouri (No. 75-77 C (3)), and St. Louis County (No. 75-78 C (3)), seek a declaratory judgment and injunctive relief declaring unconstitutional and preventing enforcement of the provisions of the Public Sector Labor Law, particularly Sections 105.510 and 105.520. In addition, the plaintiffs in action No. 75-77 C (3) seek declaratory and injunctive relief regarding Police Board Rule 8.621 promulgated by defendants Theodore D. McNeal, Edward Walsh, George Mehan, Jr., Salees Seddon and John H. Poelker acting pursuant to § 84.170, R.S. Mo., 1969, as the Board of Police Commissioners of the City of St. Louis. Rule 8.621 is a personnel regulation which prohibits commissioned officers from joining unions or other organizations not authorized by the Board.

It is the contention of the plaintiffs that the above cited statutory provisions and Rule 8.621 deny to police officers their rights of freedom of speech and assembly and to petition for redress of grievances, and creates an unreasonable and arbitrary classification between police officers and other public employees, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, §§ 9 and 29 of the Missouri Constitution. Jurisdiction is alleged under 28 U.S.C. §§ 1343, 2201-02 and 42 U.S.C. § 1983.

During the pendency of this litigation, the State of Missouri was allowed to intervene as a defendant.

The parties are presently before the Court pursuant to cross-motions for summary judgment. It is clear that there are no material questions of fact, and that the matter is now ready for disposition.

At the outset, it is appropriate to reproduce the statutes that precipitated this litigation. Section 105.510 provides as follows:

> Employees [*except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities*], of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employees to join or refrain from joining a labor organization, *except that the above excepted employees have the right to form benevolent, social, or fraternal associations.* (emphasis and brackets added).

Section 105.520 states that

> [w]henever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.

The threshold question in No. 75-78 C is whether the decision in *Fitzgerald v. diGrazia*, 383 F.Supp. 668 (E.D. Mo., 1974) (three-judge court), is dispositive of the present challenge to the constitutionality of Section 105.510 and Section 105.520.

First, defendants contend that principles of res judicata foreclose our consideration of plaintiffs' constitutional claims. In *Fitzgerald*, the court dismissed without prejudice, an action filed by County police officers challenging the constitutionality of Section 105.510 because the facts alleged failed to establish the existence of a case or controversy. Inasmuch as a court's determination that it lacks subject matter jurisdiction is res judicata of the jurisdictional issue only, see *Acree v. Air Line Pilots Ass'n*, 390 F.2d 199, 203 (5th Cir., 1968), the observation of the *Fitzgerald* court as to the merits of plaintiffs' constitutional claims are not controlling.

Secondly, significant to resolution of the case or controversy issue in No. 75-78 C is the fact that Section 105.520 was not under attack in *Fitzgerald*. Judge Regan, writing for the three-judge court in *Fitzgerald*, stressed that the complaint filed there focused exclusively on the Section 105.510[1] restriction on union affiliation. See *Fitzgerald v. diGrazia*, supra at 672. Moreover, we discern important differences between the facts as they existed in *Fitzgerald* and the circumstances that precipitated the present litigation. After *Fitzgerald*, the County Police Officers' Association organized an informational picket line, petitioned the State Board of Mediation, and continued to demand formal private negotiating sessions. On November 13, 1974, attorneys for the County Police Officers' Association sent a written demand to the Chairman of the Board. On November 19, 1974, the Chairman, by letter, summarily rejected the demand.

[1] We agree with the parties that Sections 105.510 and 105.520 should be considered together.

The County Police Officers' Association did all that was possible to obtain recognition as exclusive bargaining agent and to initiate negotiations under the guidelines of Sections 105.510 and 105.520. While the usual way to challenge a statute is to defend against enforcement, Section 105.520, which grants to all public employees, with the exception of police officers, teachers, and certain others, the right to bargain with their public employees, is framed in purely declaratory language and neither authorizes nor compels the imposition of sanctions. Assuming, for jurisdictional purposes only, that plaintiffs' constitutional claims have merit, the very existence of the provision constitutes a present invasion of plaintiffs' rights because it denies them benefits conferred upon others. Cf. *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972). Notwithstanding the proscription of Section 105.510 against police forming or joining a labor organization, see *Peters v. Board of Education*, 506 S.W. 2d 429, 432 (Mo., 1974) it stands undisputed that the St. Louis County Police Officers' Association is a member of a union local affiliated with the AFL-CIO. No sanctions have been imposed or threatened because of such membership.[2]

Thus, as in *Fitzgerald v. diGrazia*, supra, 383 F. Supp. 668, we hold that No. 75-78 C presents no case or controversy as to the Section 105.510 prohibition on union affiliation.

We are nonetheless able to reach this question in No. 75-77 C because there the effect of Rule 8.621 and the Board's policy

[2] For a period of time there existed a Code of Discipline and Ethics, promulgated by the St. Louis County Police Board, which had the effect of permitting disciplinary action against a police officer if he attempted to assert his rights guaranteed by the First Amendment to the United States Constitution. Pursuant to the suggestion of the United States District Court that disciplinary regulation was rescinded by the Board. See *Fitzgerald v. diGrazia*, 354 F.Supp. 90, 92 (E.D. Mo., 1972) and *Fitzgerald v. diGrazia*, 360 F.Supp. 485 (E.D. Mo., 1973).

statement of July 11, 1973,[3] which are based in turn on Section 105.510, is to "chill" the exercise of plaintiffs' first amendment freedoms. A stipulation of facts filed by the parties specifies that violation of any Police Department rule may subject an officer to disciplinary action, including suspension and dismissal. It is also significant, for jurisdictional purposes, that the St. Louis Police Officers' Association, unlike its County counterpart, is organized as a benevolent association and remains unaffiliated with a union local.

Turning to the merits, we will first deal with the patently invalid provisions of Rule 8.621, which provide that:

> All members of the department are forbidden to participate without board authorization in the organization of, or to become members of, any association, meeting, union, or any organization of department members other than (organizations including the St. Louis Police Officers' Association are listed), each of which has been duly authorized to perform certain and necessary functions. (parenthetical material added).

---

[3] The policy statement reads in pertinent part as follows:

Membership in benevolent, social, or fraternal organizations by police officers is authorized by Section 105.510, R.S. Mo., 1969. That same section, however, prohibits police officers from forming or joining organizations which, in turn, present proposals relative to wages and other conditions of employment in a representative capacity.

. . . . .

. . . . .

The purpose of this statement is to . . . state with all possible clarity that the Board will not entertain any dialogue relating to wages or working conditions with any "benevolent, social, or fraternal" association, or any officers thereof, acting in a representative capacity for its members. Furthermore, the Board will continue to permit membership in benevolent, social, or fraternal associations as long as such associations exist solely for those purposes. *When and if any such association commences to function in violation of the restrictions imposed by Section 105.510, R.S. Mo., 1969, such organization will be removed from the approved list set forth in Rule 8.621.* (emphasis added).

The defendants in No. 75-77 C (3) contend that Rule 8.621 is constitutional since it has a rational basis for the operation and governing of a municipal police department, citing **King v. Priest,** 206 S.W. 2d 547 (Mo., 1947) (en banc), as authority.

It is apparent that Rule 8.621 is unconstitutional on its face. Even in its narrowest reading, the rule would significantly infringe upon the plaintiffs' First and Fourteenth Amendment rights of freedom of association. There is no compelling reason for denying certain persons membership in organizations solely because of their status as policemen, where there is no showing that the organizations are detrimental to the sui generis, and para-military nature of police departmens. Similar restraints upon the First and Fourteenth Amendment rights of policemen and firemen have been held unconstitutional by other three-judge courts. *Atkins v. City of Charlotte*, 296 F.Supp. 1068 (W.D. N.Car., 1969); *Melton v. City of Atlanta*, 324 F.Supp. 315 (N.D. Ga., 1971); and *Newport News F.F.A. Loc. 794 v. City of Newport News*, 339 F.Supp. 1316 (E.D. Va., 1972).

It is clear that a police officer occupies a special role in society. An officer has a special obligation to protect and preserve the lives of the public. Allowing police to affiliate with a national labor organization clearly raises the spector of a strike against the public interest, c.f. *Atkins v. City of Charlotte*, supra. However, it is also equally clear that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly. . . ." *N.A.A.C.P. v. Alabama, ex rel. Flowers*, 377 U.S. 288, 307 (1964). The appropriate method for protecting the state's legitimate interest in averting such a strike is not to restrict freedom of association, but rather to fashion precise legislation declaring such strikes illegal. *Police Officers' Guild v. Washington*, 369 F.Supp. 543, 553 (D. D.C., 1973) (three-judge court). Such a legislative remedy has already been enacted in Missouri by Section 105.530, R.S. Mo., 1969, which withholds the right to strike from all public employees.

For the foregoing reasons, it is clear that Rule 8.621 exceeds the permissible bounds of the First and Fourteenth Amendments.

It must be made clear, however, that the state may properly prohibit police officers, whether or not union members, from engaging in work slowdowns, strikes, sick-ins, and other related activities. *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir., 1973); *United States Federation of Postal Clerks v. Blount*, 325 F.Supp. 879 (D.C. D.C., 1971) (three-judge court), *aff'd*, 404 U.S. 802 (1971). The Missouri Legislature has indicated its position with regard to the above proscribed activities by the enactment of Section 105.530. So that there will be no mistake as to our holding, we again emphasize that a public employee's right to exercise certain constitutional freedoms shall not be denied on the basis of an irrational criteria. Those constitutional rights will not provide a shield for actions clearly against the public interest such as a strike of police officers, *c.f. Atkins v. City of Charlotte*, supra, at 1076; *Melton v. City of Atlanta*, supra, at 319-320. The prospect of a city or community being forced to operate without police services would constitute such a "clear and present danger" that such strike activities would not be entitled to constitutional protections. *Thomas v. Collins*, 323 U.S. 516, 529-543 (1944).

Section 105.510 has been used as an enabling measure for a patently invalid restriction upon the constitutional freedoms of citizens, namely Rule 8.621. It has become almost an axiom of law that the prospective chilling of First Amendment rights will give a party standing to challenge an allegedly invalid legislative enactment, *c.f. Long-Shoremen's Union v. Boyd*, 347 U.S. 222 (1947); *Lecci v. Cahn*, 493 F.2d 826 (2nd Cir., 1974); Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction § 3532, at 249-53. The fact that Section 105.510 has been used to promulgate invalid rules which restrict constitutional freedoms is clearly an indication that the provisions of that section which prohibit police officers from forming or joining labor organizations exceed the permissible bounds of the First and Fourteenth Amendments. The language of Section 105.510 clearly "sweep[s] unnecessarily broadly . . ." *N.A.A.C.P. v. Alabama, ex rel. Flowers*, supra. As we discussed above, the enactment by the State of Missouri of Section 105.530, R.S. Mo., 1969, is the proper method of restricting illegal activities of public servants with regards to labor disputes. Therefore, we declare that Section 105.510, insofar as it prohibits police officers from forming or joining labor organizations, is unconstitutional.

The exclusion of policemen from the provisions of Section 105.520, which regulates the limited bargaining of public employees in Missouri raises the possibility of an irrational classification in violation of the Fourteenth Amendment. However, since as we have stated, there is no constitutional right to collective bargaining, the issue is whether the classification has a rational relation to a legitimate governmental interest. See *Prostrollo v. University of South Dakota*, 507 F.2d 775, 780 (8th Cir., 1974).

Police officers occupy such a unique place in society that it cannot be said that no rational basis exists for the classification in Section 105.520. *Melton v. City of Atlanta*, supra, at 319. The determination of bargaining procedures for policemen is a decision properly reserved to the Missouri legislature. *Atkins v. City of Charlotte*, supra, at 1077.

In summary we hold and declare as follows:

1. That Rule 8.621 as promulgated by the Board of Police Commissioners of the City of St. Louis is void on its face as an abridgement of freedom of association protected by the First and Fourteenth Amendments of the United States Constitution;

2. That Section 105.510, R.S. Mo., 1969, is unconstitutional insofar as it prohibits police officers from forming or joining labor organizations; and

3. That the Section 105.510 exclusion of police officers from the bargaining procedures enunciated in Section 105.520 has a rational relation to a legitimate objective of the state and does not abridge any of plaintiffs' constitutional rights.

The plaintiffs have asked that the defendants be enjoined from enforcing the rule now adjudged to be unconstitutional. However, since a federal court should issue its injunctive process against state or local officers only in situations of a most compelling necessity, and this Court has no indication that this Court's decision will be ignored by the named individual defendants who comprise the St. Louis City Board of Police Commissioners, this Court will not grant injunctive relief regarding Rule 8.621. *Atkins v. City of Charlotte*, supra, at 1078. Accordingly, the request for injunctive relief will be denied.

Dated this 19 day of February, 1976.

/s/ M. C. Matthes
M. C. Matthes, Senior Circuit Judge

/s/ James H. Meredith
James H. Meredith, Chief District Judge

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin, District Judge

APPENDIX B

MISSOURI CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article 1, Section 29—Constitution of the State of Missouri 1945
Organized Labor and Collective Bargaining

That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Section 105.500-105.530 Missouri Revised Statutes

LABOR ORGANIZATIONS

105.500. Definitions

Unless the context otherwise requires, the following words and phrases mean:

(1) **"Appropriate unit"** means a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned;

(2) **"Exclusive bargaining representative"** means an organization which has been designated or selected by majority of employees in an appropriate unit as the representative of such employees in such unit for purposes of collective bargaining;

(3) **"Public body"** means the state of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state. As amended Laws 1967, p. 192, § 1.

105.510. Certain public employees may join labor organizations and bargain collectively—exceptions—discharge or discrimination for exercise of rights prohibited—allowable organizations for excepted employees

Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization, except that the above excepted employees have the right to form benevolent, social, or fraternal associations. Membership in such associations may not be restricted on the basis of race, creed, color, religion or ancestry.

Amended by Laws 1967, p. 192, § 1; Laws 1969, p. 186, § 1.

105.520. Public bodies shall confer with labor organizations

Whenever such proposals are presented by the exclusive bargaining representative to a public body, the public body or its designated representative or representatives shall meet, confer and discuss such proposals relative to salaries and other conditions of employment of the employees of the public body with the labor organization which is the exclusive bargaining representative of its employees in a unit appropriate. Upon the completion of discussions, the results shall be reduced to writing and be presented to the appropriate administrative,

legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection. As amended Laws 1967, p. 192, § 1.

105.525 Issues as to appropriate bargaining units and majority representative status to be decided by state board of mediation—appeal to circuit court

Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the state board of mediation. In the event that the appropriate administrative body or any of the bargaining units shall be aggrieved by the decision of the state board of mediation, an appeal may be had to the circuit court of the county where the administrative body is located or in the circuit court of Cole county. The state board of mediation shall use the services of the state hearing officer in all contested cases. Added Laws 1967, p. 193, § 1 (§ 105.530).

105.530. Law not to be construed as granting right to strike

Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike. As amended Laws 1967, p. 193, § 1 (§ 105.540).

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

JOHN C. DANFORTH
Attorney General
State of Missouri

GLEN A. GLASS
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Appellee, State of Missouri

E. L. Mendenhall, Inc., 926 Cherry St., Kansas City, Mo. 64106, 816-421-3030

INDEX

Cases Cited

STATUTES AND REGULATIONS

OTHER

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Appellee, State of Missouri, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment of the United States District Court for the Eastern District of Missouri in this matter be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT

Appellee, State of Missouri, was notified on January 29, 1975, by the Clerk, United States District Court, for the Eastern District of Missouri, that the complaint in this case and a similar suit[1] had been

1. The case presently on appeal before this Court was filed simultaneously with a case entitled *Sahm, et al.* v. *Nations, et al.*, No. 75-78(C)(3), and by order of the lower court dated March 6, 1975, the cases were consolidated. Appellants in Case No. 75-78(C)(3) did not file a notice of appeal to this Court.

duly filed, challenging the constitutionality of §§ 105.510-105.520, Revised Statutes of Missouri, 1969. Thereafter, on April 16, 1975, this appellee filed its motion to intervene. The motion to intervene as a party-defendant was granted by the lower court on July 24, 1975.

Appellants, in their *Jurisdictional Statement* to this Court, have set forth the requisite jurisdictional matters and history of this case, together with an appendix reciting all state statutory matters directly in issue on this appeal and the opinion of the lower court. Therefore, this appellee does not feel it necessary to recite the jurisdictional basis for this appeal and hereby adopts those portions of appellants' *Jurisdictional Statement* entitled "Preliminary Statement", "Jurisdiction", "Statutes Involved" (*Jurisdictional Statement*, pp. 1-3), and the "Appendix".

ARGUMENT

Appellants have claimed that their appeal presents to this Court a significant concern of public employees relating to their alleged constitutional right to bargain with representatives of an appropriate public body. Appellee, State of Missouri, respectfully suggests that federal and state courts have consistently held that no such constitutional right exists. Therefore, the judgment entered by the United States District Court, Eastern District of Missouri, is proper and leaves no substantial question unresolved which requires further decision by this Court.

Appellants contend that the judgment of the lower court failed to recognize "an arbitrary, capricious, and irrational classification" resulting in the exclusion of police officers from the provisions of § 105.520, Revised Statutes of Missouri 1969. The fundamental question upon which appellants' entire argument is predicated is the presence or absence of a constitutional right by public employees in Missouri to bargain[2] over wages, hours, and working conditions with appropriate government representatives. Contrary to appellants' assertions, the right to collective bargaining, in both the public and private sector, is a statutory right without a constitutional requirement for its existence.

---

2. Section 105.520, RSMo 1969, is not true collective bargaining as that term is accepted in the private sector and defined in the Labor-Management Relations Act, 29 U.S.C. § 158(d) (see Footnote 3). Section 105.520 is merely a "meet and confer" statute which implies negotiations amounting to a discussion and unilateral action by a public body. True collective bargaining generally implies good faith bargaining by equal parties. Edwards, *The Emerging Duty to Bargain in the Public Sector*, 71 Mich. L.Rev. 885, 895 (1973).

Clearly, the right to bargain collectively with employers in the private sector did not exist prior to the enactment of the National Labor Relations Act. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937); *National Labor Relations Board* v. *Edward G. Budd Manufacturing Co.*, 169 F.2d 571, 577 (6th Cir. 1948), cert. denied, *Foremans Association of America* v. *Edward G. Budd Manufacturing Co.*, 335 U.S. 908 (1949).

The right of private sector employees to bargain collectively, established by Congress, is found, in part, in Subchapter II of the Labor-Management Relations Act, 29 U.S.C. §§ 151-168 (1970). 29 U.S.C. § 157 (1970) provides the statutory guarantee that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." The scope of the term "collective bargaining" for purposes of the Labor-Management Relations Act is set forth in 29 U.S.C. § 158(d) (1970).[3] However, the act further provides that the term "employer" shall "not include the U.S. or . . . any state or political subdivision thereof". 29 U.S.C. § 152(2) (1970). In addition, an "employee" for purposes of the Labor-Management Relations Act does not include "any individual employed . . . by any other

3. 29 U.S.C. § 158(d) (1970) defines collective bargaining as:

". . . the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . ."

person, who is not an employer as herein defined". 29 U.S.C. § 152(3) (1970). Therefore, public employees are clearly excepted from the bargaining rights set forth in the Labor-Management Relations Act.

Appellee, State of Missouri, submits that federal courts have consistently upheld this principle, that collective bargaining is of statutory, and not constitutional, origin. *Hanover Township Federation of Teachers Local 1954* v. *Hanover Community School Corporation*, 457 F.2d 456, 461 (7th Cir. 1972); *Atkins* v. *The City of Charlotte*, 296 F.Supp. 1068, 1077 (W.D. N.C. 1969); *Newport News F.F.A. Local 794* v. *City of Newport News*, 339 F.Supp. 13, 16 (E.D. Va. 1972); *Confederation of Police* v. *City of Chicago*, 382 F.Supp. 624, 628 (N.D. Ill. 1974).

It should furthermore be noted that the Supreme Court of Missouri has construed the Missouri constitutional provision guaranteeing employees the right to collective bargaining as not being applicable to local governments under the same general principle. In *City of Springfield* v. *Clouse*, 206 S.W.2d 539, 543 (Mo. Banc 1947), the court held that the right to bargain collectively is not an inherent constitutional right and Article I, Section 29, Constitution of Missouri, 1945, was designed to provide for collective bargaining as that term is understood in employer-employee relations in the private sector. Accordingly, the Supreme Court of Missouri has properly recognized public employee exclusion from collective bargaining in the same manner as federal courts. Certainly this construction makes § 105.520 compatible with the Missouri constitutional provision in question and leaves no substantial question, in this area, for resolution by this Court.

Appellants have further asserted that the exclusion of police officers from the provisions of § 105.520, RSMo 1969, is contrary to their right to equal protection of the law. It is respectfully submitted that the lower court properly held that there exists a rational relation between the exclusion of police from the provisions of § 105.520 and the legitimate interests of the State of Missouri. It is submitted that, since as noted above, there exists no constitutional right for appellants to engage in collective bargaining, any rational basis justifies appellants' exclusion from the provisions of § 105.520, RSMo 1969. *Johnson* v. *Robison*, 415 U.S. 361 (1974); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949).

This appellee suggests that a rational basis plainly exists for excluding police from the statutory bargaining process set forth in § 105.520. The State of Missouri and its political subdivisions may exclude police from the limited bargaining process because of the very nature of the police force. Police are certainly *sui generis*, performing a public function with a required degree of discipline and regimentation. In order to be effective, they must be considered by themselves and their public employers as a quasi-military, disciplined force ready to respond to public call. Accordingly, they are quite different from other public employees who, generally, are not shouldered with the burden of constant, indispensable, and often dangerous public service. The Supreme Court of Missouri has recognized this unique place occupied by the police in the state. *King* v. *Priest*, 206 S.W.2d 547, 554-555 (Mo. Banc 1947); *State ex rel. Missey* v. *City of Cabool*, 441 S.W.2d 35, 43 (Mo. 1969).

Appellee, State of Missouri, feels it significant to recognize that this Court has recently noted the special type of public function performed by police, necessitat-

ing the dominance of legitimate state interests over asserted liberties under the Fourteenth Amendment to the United States Constitution. In *Kelley* v. *Johnson*, 44 U.S.L.W. 4469 (U.S., April 6, 1976), this Court upheld a Suffolk County, New York, regulation which restricted the length of policemen's hair. This Court reasoned that the very nature of police work results in a limited infringement on the individual policeman's freedoms in matters personal to him. It is submitted that, likewise, the exclusion of policemen from the provisions of § 105.520, RSMo 1969, has a clear, rational basis founded upon the regulated nature of the police profession.

This Court's attention is invited to *Quinn* v. *Muscare*, 44 U.S.L.W. 4627 (U.S., May 3, 1976) where the constitutionality of a Chicago Fire Department regulation prohibiting beards was challenged as violative of several constitutional amendments, including the Fourteenth. This Court dismissed the writ of certiorari previously granted relying, in part, on *Kelley* v. *Johnson*, *supra*.

The most concise expression of the law, encompassing all areas presented to this Court by appellants, can be found in the opinion of the Court in *Indianapolis Education Association* v. *Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969). In that case the Court, in determining whether a public body (school board) has a constitutional obligation to bargain collectively, held:

> ". . . there is no constitutional duty to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the defendants-appellants to bargain in good faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of asso-

ciation, free speech, petition, equal protection, or due process. Nor does the fact that the agreement to collectively bargain may be enforceable against a state elevate a contractual right to a constitutional right." (*Id.* at 2072)

This appellee feels compelled to suggest that appellants' assertion, in his jurisdictional statement to this Court, that "there has been no showing or suggestion of how the grant of the rights in question which are enjoyed by all public employees in Missouri would impair the asserted state interest"[4] suggests an erroneous test to be applied in this case. Clearly, appellant is burdened with the obligation to demonstrate that there is no rational relation between the exclusion of policemen from § 105.520 and the State of Missouri's interest in the maintenance of a disciplined police force and the results obtained thereby. *Kelley* v. *Johnson*, *supra*. Therefore, plaintiff had the obligation in the lower court to show the absence of a rational relation between the exclusion and the state interest.

The State of Missouri respectfully submits, therefore, that appellants have presented no substantial question for the decision of this Court, and that the

---

4. Page 9, Appellants' *Jurisdictional Statement*.

judgment of the United States District Court for the Eastern District of Missouri should be affirmed.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
State of Missouri

GLEN A. GLASS
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Appellee, State of Missouri

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

LASHLY, CARUTHERS, THIES, RAVA & HAMEL
A Professional Corporation
JOHN H. LASHLY
ALBERT J. STEPHAN, JR.
KENNETH C. BROSTRON
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
(314) 621-2939
Attorneys for Appellees

St. Louis Law Printing Co., Inc., 2 Olive Street 63101 314-231-4477

INDEX

Table of Cases

Statutes Cited

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

MOTION TO AFFIRM

Come now the appellees, the members of the Board of Police Commissioners of the City of St. Louis, and move the Court to affirm the judgment below on the grounds that:

1. The basic issue whether the appellant police officers have a constitutional right to require the State of Missouri, through the Board of Police Commissioners of the City of St. Louis, to

bargain collectively with representatives of said police officers concerning wages, hours and working conditions, is a matter of settled law in that it has consistently been answered negatively by both the federal courts and the Supreme Court of the State of Missouri.

2. The decision to grant to or withhold from public employees the right to bargain collectively is within those matters reserved to the states by reason of the Tenth Amendment to the United States Constitution and it is proper, through the exercise of the State of Missouri's police power, to decline to negotiate and contract with policemen with regard to wages, hours, and working conditions.

3. The central and primary purpose of the State of Missouri's exercise of its police power is the duty to safeguard the welfare of its citizens and their property and, therefore, any decision not to give mandatory collective bargaining privileges to police officers relates to the achievement of the legitimate state purpose of preserving public welfare and establishing an efficient police department to exercise that responsibility.

4. The Court below recognized the difference between freedom of association and the right to collectively bargain. In recognizing this, the Court held that the appellant police officers can form and join a labor organization. Thus, the only federal question of any substance presented below was resolved in favor of the appellants.

5. The questions presented are not so substantial as to require the plenary consideration of this Court, with briefs on the merits and oral arguments for resolution, as to any claim of a denial of equal protection in that the appellants are not an identifiable suspect class and no fundamental right is at issue. Absent these crucial elements, the three-judge panel properly applied the rational basis test and properly held that it cannot

be said that no rational basis could exist between the exclusion of police officers from the collective bargaining procedures of Section 105.520 R.S.Mo. 1969 and the legitimate state purpose of an effective police force.

WHEREFORE, the appellees submit that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and pray that this Court enter an order affirming the judgment of the Court below.

Respectfully submitted

LASHLY, CARUTHERS, THIES, RAVA & HAMEL
A Professional Corporation

JOHN H. LASHLY

ALBERT J. STEPHAN, JR.

KENNETH C. BROSTRON
818 Olive Street, Suite 1300
St. Louis, Missouri, 63101
(314) 621-2939
Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri

BRIEF IN SUPPORT OF MOTION TO AFFIRM

ARGUMENT

I

Appellants Have No Constitutionally Secured Right to Collectively Bargain With Appellees.

There is no constitutional right to force an employer to bargain collectively with an employee or a group of employees.

Many courts including the court below have so held. *Atkins v. City of Charlotte*, 296 F.Supp. 1068, 1077 (three judge court) (W.D. N.C. 1969); *Melton v. City of Atlanta, Georgia*, 324 F.Supp. 315, 320 (three judge court) (N.D. Ga. 1971); *Confederation of Police v. City of Chicago*, 382 F.Supp. 624, 628 (N.D. Ill. 1974); *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. Phillips*, 381 F. Supp. 644, 646 (three judge court) (M.D. N.C. 1974); *University of New Hampshire Chapter of the American Association of University Professors v. Haselton*, 397 F.Supp. 107, 109 (three judge court) (D. N.H. 1975); *Newport News Fire Fighters Association Local 794, International Association of Fire Fighters v. City of Newport News, Virginia*, 339 F.Supp. 13, 17 (E.D. Va. 1972); *Hanover Township Federation of Teachers Local 1954 (AFL-CIO) v. Hanover Community School Corporation*, 457 F.2d 456, 461 (7th Cir. 1972); *Lontine v. VanCleave*, 483 F.2d 966, 968 (10th Cir. 1973).

No court has held otherwise.

II

Under the Powers Reserved by the Tenth Amendment, the State of Missouri Has Properly Excluded Police Officers From Those Public Employees Entitled to Compel Their Employers to Meet, Confer and Discuss Wages, Hours and Working Conditions With Representatives of Such Employees.

The appeal by the appellants for mandatory bargaining procedures to negotiate the conditions of their employment must be an appeal to the Missouri Legislature, not to the federal courts. From all of the case law and statutory provisions relied upon by all parties, it is indeed manifest that the central question on which the decision depends is so unsubstantial regarding the constitutional rights of appellants as not to need

further argument in the courts. Thus, the judgment as to bargaining procedures available to police officers must be affirmed.

Missouri, as other jurisdictions, adheres to the fundamental proposition that legislative discretion cannot be delegated away. No citizen or group of citizens has the right to contract for legislation or to prevent legislation. *City of Springfield v. Clouse*, 206 S.W.2d 539, 543 (Mo. en banc 1947); *King v. Priest*, 206 S.W.2d 547, 556 (Mo. en banc 1947). For this very reason, the Missouri Supreme Court unanimously held in *City of Springfield v. Clouse, supra*, at 543, that Article I, Section 29 of the Missouri Constitution is a declaration of approval by the State of Missouri of the policy set forth in the National Labor Relations Act but that that constitutional provision does not give public employees the right to collectively bargain.

The decision, by the citizens of the State of Missouri through their legislators, to withhold from the police collective bargaining procedures set forth in Sections 105.510 and 105.520, R.S.Mo. 1969, as amended, is within the powers reserved to the State through the Tenth Amendment. The State may properly refuse to bargain with its employees and declare it by statute. *Atkins v. City of Charlotte, supra*, 1077. In *Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators v. Phillips*, the court articulated this point at 381 F.Supp. 648, fn. 4:

> "The Tenth Amendment of the United States Constitution reserves to the states those powers not delegated to the federal government. The Amendment is a clear expression of the desire that the states would retain their sovereignty within our federal form of government. The decision by the State of North Carolina to void contracts between public employee organizations and governmental units is a matter entrusted to the state's sovereign discretion. See *Atkins, supra*, as quoted above. It cannot be

emphasized enough that in speaking of a state's sovereignty, the term means more than prerogatives belonging to some inanimate object, rather it signifies the right of the people of a state to govern themselves under the form of government of their choosing. Therefore, since the prospect of public employee collective bargaining impinges upon those rights, it truly is important that the legislature, elected by the people, determine whether to permit such collective bargaining, and if so, on what terms."

III

An Effective, Efficient and Disciplined Police Force Is a Legitimate State Purpose and It Cannot Be Said That the Exclusion of Police Officers From the Statutory Right to Collectively Bargain, as Provided in Section 105.520, R.S. Mo. 1969, Does Not Rationally Relate to the Achievement of That Goal.

With respect to appellant's equal protection argument, policemen certainly are not a traditionally suspect group targeted for discrimination. Indeed, no such argument has ever been advanced by the appellants at any stage of this action. The fundamental right to associate was carefully and properly treated separately and apart by the Court from its analysis of the policemen's right to collectively bargain. The distinction between freedom of association and collective bargaining is the difference between meeting with whom one wants and the duty to participate in such a meeting. While First Amendment rights cannot be withheld, this Court has recognized that it does not possess "either the ability or authority to guarantee to the citizenry the most *effective* speech . . ." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 36 (1973).

Mandatory collective bargaining is not constitutionally fundamental but a legislative perogative. Thus, for equal protection purposes, a "statutory discrimination will not be set aside if any

state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). It is indeed clear that the rational basis standard was properly applied to the appellants' equal protection argument before the three judge panel.

"And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 485-486 (1970).

The burden is not upon appellees to establish that a rational basis exists between the denial of collective bargaining rights to police officers and a disciplined police force, as appellants suggest on page 9 of their jurisdictional statement. *Morey v. Doud*, 354 U.S. 457, 464 (1957). The dispositive fact is that appellants failed to demonstrate that there is no rational connection between the exclusion of policemen from the limited collective bargaining procedures granted to other public employees and the promotion of the safety of persons and property. *Kelley v. Johnson*, 44 L.W. 4469, 4472 (No. 74-1269, decided April 5, 1976).

The First Amendment claims of the appellants are not seriously pressed by them on this appeal. Indeed, both "Questions Presented" urge this Court's consideration of appellants' equal protection claims. Although no First Amendment right is directly involved, it should be noted that this Court has stated in *Kelley v. Johnson*, 44 L.W. at 4471:

> "More recently, we have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). If such state regulations may survive challenges based on

the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment."

The discipline and government of the police force has been recognized as essential to the public peace by the State of Missouri. *King v. Priest*, 206 S.W.2d 547, 554 (Mo. en banc 1947). The efficiency of public employees is a legitimate and substantial governmental interest. *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 565 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-617 (1973). The people of Missouri obviously have voiced their desire not to allow policemen to negotiate their working conditions through the collective bargaining procedures. Just as this Court found hair regulations to relate rationally to the mode of organization of a police force in *Kelley v. Johnson, supra*, so too does the decision of the people of Missouri to withhold the right to collectively bargain from policemen relate to the discipline necessary to the efficient operation of a police department.

The people of Missouri, through their legislative representatives, have "chosen a mode of organization which it undoubtedly deems the most efficient in enabling its police to carry out the duties assigned to them under state and local law. Such a choice necessarily gives weight to the overall need for discipline, *esprit de corps*, and uniformity." *Kelley v. Johnson*, 44 L.W. at 4472; *Quinn v. Muscare*, 44 L.W. 4627, 4628 (No. 75-130, decided, May 3, 1976).

The nature of a police organization requires members of different rank and the unquestioned execution of commands. The promotion of the safety of persons and property are indeed at the core of the State's police power. The organization of the police department and the conditions of its membership in order

to promote and maintain the safety of the citizenry for whom it was organized to serve has been voiced and enacted by the State of Missouri. The statutes challenged do no violence to any right granted to appellants by the First and Fourteenth Amendment. The appellants are simply in error in their position that collective bargaining is a constitutional right and that their exclusion from the bargaining procedure is a denial of equal protection.

If appellants' economic need requires the use of the bargaining procedures at issue here, they must persuade the people of the State of Missouri, through its legislative process, not this Court or these appellees.

The questions raised in this appeal involve issues of State legislation and the internal affairs of the State of Missouri. No confusion exists in the federal courts as to the distinction between the freedom of association and the right to collectively bargain. The appellants are free to exercise the former. However, they have failed to persuade the people of Missouri that the grant of the right to collectively bargain with the State will not detract from the efficient police department established for the protection of the people of Missouri.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further judicial consideration and, therefore, the Court should affirm the judgment below without further briefs or argument.

Respectfully submitted

LASHLY, CARUTHERS, THEIS,
RAVA & HAMEL
A Professional Corporation

JOHN H. LASHLY

ALBERT J. STEPHAN, JR.

KENNETH C. BROSTRON
818 Olive Street, Suite 1300
St. Louis, Missouri 63101
(314) 621-2939
Attorneys for Appellees

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

LONDON & GREENBERG
NORMAN S. LONDON
LAWRENCE J. FLEMING
418 Olive Street—Suite 404
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Appellants

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1550

WILLIAM J. VORBECK, et al.,
Appellants,

vs.

THEODORE D. McNEAL, et al.,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

ARGUMENT

Appellants Have Shown That There Is No Rational Relation Between the Exclusion of Police Officers From the Bargaining Rights Granted to Other Public Employees by § 105.520 R.S.

Mo. 1969 and the Asserted State Interest of Maintaining an Effective, Efficient and Disciplined Police Force.

Appellants reassert the arguments made in their Jurisdictional Statement under the heading "The Questions Are Substantial." Additionally Appellants wish to respond to appellee's contention that they have failed to demonstrate the lack of a rational relationship between the exclusion of police officers from the bargaining procedures granted to other public employees by §§ 105.510-520 R.S. Mo. and the asserted state interest of maintaining an effective, efficient and disciplined police force.

Appellants reemphasize that their complaint centers on the fact that they are treated differently from all other public employees in Missouri who are granted the bargaining rights created by § 105.510, R.S. Mo. Such other public employees include, for example, firemen who in Missouri have long enjoyed the benefits of the limited bargaining procedures set out in the Missouri Statute. Prior to the ruling of the District Court in the present case, appellants were denied their constitutional right to join or form a labor organization guaranteed to them by the association and free speech clauses of the First Amendment to the United States Constitution. The District Court recognized that appellants have such a right, and there is no appeal pending from that portion of the decision. Consequently the right of police officers to affiliate with a labor organization is not in issue here.

Appellants contend that in granting them the right to join the class for whom the bargaining procedures were created, the District Court should not then withhold from them the rights granted to all other members of the class to wit the right to meet, and confer with their employers and to reduce the results of these meetings to writing. The holding of the District Court is therefore erroneous.

The asserted state interest in maintaining an effective, efficient, disciplined police force is not rationally related to the exclusion

of police officers, who now have the right to **join** a union, from the bargaining procedures created by §§ 105.510-520 R.S. Mo. To the contrary the state interest will be safeguarded by the utilization of the orderly procedures set out in the statute.

There are two bases proposed by appellees for finding a rational relation between the rights withheld and the asserted state interest in this case. One: appellees apparently assert a threat of a police strike if police officers are granted the bargaining rights granted to all other public employees. See District Court Opinion at pp. 8-10. The other base apparently asserted is that police officers may divide their loyalty between the union and the police command structure and that this divided loyalty may lead to a situation in which a police officer may refuse an assignment or refuse to perform some act because of his union activities, thus jeopardizing the safety of property and populace. See Tr. at 38, 41. Appellants contend that they have shown that these assertions have no basis in fact or logic and that there is absolutely no rational relation between the withholding of the *bargaining procedures* from the now lawful police unions and the asserted state interest.

Fear of a police strike is a thread that has run throughout the course of this lawsuit. (Op. at 8-10) However, as pointed out both by the District Court in its opinion (Op. at 9), and by appellant's Brief in the District Court (Br. at 6), the right to strike is specifically withheld from all public employees in Missouri whether or not they are granted the bargaining rights established by §§ 105.510-520 R.S. Mo.

Thus, prevention of a police strike cannot form the rational basis for withholding the rights in question because such a strike is already legally prohibited by § 105.530 R.S.Mo., 1969. Granting the right in question (the right to communicate with the police board) would not increase and may in fact decrease the possibility of such an unlawful strike.

The only other possible base for establishing a rational relation between the exclusion of police officers from the bargaining procedures and the asserted state interest is the belief that somehow the granting of these rights to police officers might cause these officers to divide their loyalty between the union and the departmental command structure. This divided loyalty might then it is argued lead to a situation in which an officer might refuse an assignment or refuse to perform some act because of his union activities (Tr. at 38, 41), although it is entirely unclear as to how the right to "meet and confer," as opposed to the recognized right to join the union, might have such an effect.

The District Court stated in its Memorandum Opinion, that "There is no compelling reason for denying certain persons membership in organizations solely because of their status as policemen, where there is no showing that the organizations are detrimental to the sui generis, and para-military nature of police departments." (Op. at 8). Appellants fail to see how the function of an organization within the orderly perameters of §§ 105.-510-520 can possibly be detrimental to the operation of a police department if membership in the organization itself is found not to be detrimental. The function of the organization is its reason for being. The bargaining provisions of the statute are the only reason for "allowing" public employees to join labor organizations.

The suggestion that granting police officers the bargaining rights in question may cause him to become less loyal to the command structure is wholly without reasonable basis in fact. A police officer knows the consequences of disobeying a direct order. He is subject to immediate dismissal. This is common knowledge. Appellants in no way question the propriety of this procedure. Appellants are subject to the same sanctions for disloyalty and disobeyance of a lawful order regardless of what rights are granted to or withheld from them. Appellants simply contend that granting them the same bargaining rights granted

to all other public employees (including firemen) would have absolutely no effect of the internal discipline of the police department.

Appellants invite the Court's attention to the exhibit entitled "Summary of State Labor Laws" which was introduced into evidence in the District Court (Tr. at 36). This exhibit shows that forty states have enacted statutes which either compel or permit bargaining between police and their governing bodies, and in no state other than Missouri are police treated differently than other public safety employees with regard to bargaining rights. Appellants believe that this exhibit shows that such bargaining procedures in fact do not have any detrimental effect on the discipline, efficiency or effectiveness of police department. It seems clear that if these bargaining procedures had any detrimental effect on police effectiveness, four-fifths of the States would not allow these statutes to stand.

Appellants believe that they have amply shown that there is no rational basis for the belief that granting them the rights in question would have a detrimental effect on the police organization. *Kelley v. Johnson*, 44 U.S.L.W. 4469 (U.S. April 6, 1976). Thus there is no rational relation between the withholding from police officers of rights granted to all other public employees in Missouri and the asserted state interest in maintaining a disciplined, effective and efficient police force. Because there is no rational relation, the classification of police officers vis-a-vis all other public employees is an impermissible violation of appellants' right to the equal protection of the laws.

CONCLUSION

For the above reasons, it is respectfully submitted that appellees' Motion to Affirm should be denied and that the issues in the case require plenary consideration of the Supreme Court with briefs on the merits and oral arguments for their resolution.

Respectfully submitted

LONDON & GREENBERG

NORMAN S. LONDON

LAWRENCE J. FLEMING
418 Olive Street—Suite 404
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Appellants